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No. 93-880

In the Supreme Court of the United States

OCTOBER TERM, 1993

JUDY MADSEN, ET AL., PETITIONERS

v.

WOMEN'S HEALTH CENTER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The United States will address the following question:

Whether the injunction provisions challenged by petitioners are consistent with the First Amendment.

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INTEREST OF THE UNITED STATES

This case arises out of an action brought in Florida state court by respondent medical clinics, which provide abortion-related services to patients. A Florida trial court issued an injunction against petitioners and others who had engaged in and threatened to engage in wrongs to the clinics, including impeding clinic patients and employees from entering the clinic, and intimidating and harassing patients and employees at a clinic and at their residences. The Florida Supreme Court upheld the validity of the injunction. Petitioners challenge certain provisions of the injunction as violations of their First Amendment rights of freedom of speech and association.

The United States has an important interest in seeing that adequate judicial relief is available against those who

illegally impede access to medical clinics providing abortion-related services. Legislation is currently pending in Congress that prohibits the intimidation of, or interference with, any person obtaining or providing abortion-related services. See H.R. 796, S. 636, 703d Cong., 1st Sess. (1993) (The Freedom of Access to Clinic Entrances Act of 1993). If enacted, the legislation will authorize the Attorney General to bring criminal charges for violations of the law, as well as to seek injunctive relief. The constitutional analysis that is applied by the Court in resolving this case may have a direct bearing on the validity and interpretation of that legislation.

The United States also has an important interest in preserving the ability of its citizens to exercise their First Amendment rights in a manner compatible with the rights of others.

STATEMENT

1. Respondents own and operate medical clinics in Brevard and Seminole counties, Florida and other parts of central Florida that provide abortion services and birth control counselling to women. J.A. 6. In October, 1991, respondents filed suit in Florida state court against petitioners Judy Madsen, Ed Martin and Shirley Hobbs, as well as others including Operation Rescue, Operation Rescue America, Operation Goliath, Bruce Cadle, Pat Mahoney, and Randall Terry. Respondents sought an injunction preventing these defendants[1] from engaging in announced plans to block access to respondents' clinics.

On October 25, 1991, the Circuit Court in and for Seminole County granted a temporary restraining order against defendants, and all persons acting in concert with

[1] The persons against whom relief was sought were referred to in the state trial court proceedings as "respondents." We use the term "defendants" to avoid confusion with the respondents in this Court (who were the plaintiffs in the trial court). We use "petitioners" to refer to the three defendants who are now petitioners in this Court.

them. Prior to ruling on the request for permanent injunctive relief, the court required the parties to submit a stipulation of issues and facts. Petitioners stipulated that they are "active in an organization known as 'Operation Rescue America'" and "are members of Operation Rescue America." Pet. App. A2 n.2, R. 64-65. Petitioners further stipulated that their "desire is to close down 'abortion mills' by various means," that they understood that "peacefully blocking access to the facilities might constitute a trespass that is punishable by criminal penalties," and that they felt 'a violation of such a criminal statute is justified by their belief that protection of the unborn may merit breaking the criminal trespass laws.' R. 65. The stipulation also provided that petitioners had not at that time physically blocked access to abortion clinics in Brevard or Seminole counties. *Ibid.*

On September 30, 1992, the court entered a permanent injunction supported by findings of fact. J.A. 5-10. The court found that the defendants were "individuals and organizations, acting in concert" who were engaged in a nationwide campaign directed towards closing down abortion clinics and providers by blocking access to clinics, Pet. App. A3 n.3, J.A. 6, that petitioners were members of Operation Rescue and Operation Rescue America, *ibid*; that Rescue America literature states that "their members should ignore the law of the State and the police officers who remove them from blockading positions," J.A. 7; that the defendants had wrongfully interfered and intended to continue wrongfully to interfere with respondents' property interests and business relationships, J.A. 7-8; that the defendants also had sought to interfere with the right of choice of respondents' patients, and the right to work of respondents' employees, rights guaranteed by the Florida constitution, J.A. 8; and that respondents, their patients and employees had no adequate remedy at law and would suffer irreparable

injury if the defendants were not enjoined from blocking or interfering with access to respondents' clinics, J.A. 7.

The court determined that the defendants' threatened actions provided a proper basis for injunctive relief under state law because the applicable criminal statutes would not adequately address the injuries that respondents would suffer if the defendants were not restrained. J.A. 8-9. The court therefore enjoined the defendants from: "(1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida; (2) physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and (3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above." J.A. 9. The court specified that nothing in the injunction should be construed to limit the defendants' exercise of their legitimate First Amendment rights in a manner that did not violate the three quoted paragraphs. *Ibid.*

2. In March, 1993, respondents filed emergency motions for sanctions against defendants for violation of the injunction and for modification of the injunction with respect to the Aware Woman Clinic in the city of Melbourne, Brevard County, Florida (the clinic).

After a three-day evidentiary hearing, the court concluded that, despite the injunction, "there ha[d] been interference with [the] ingress to" the clinic, including interference by some persons on the paved street, some persons approaching and trying to communicate with persons in moving cars, and some persons marching in a manner that crossed the entrance driveways into the clinic parking lots. J.A. 50-51. The court found that this conduct resulted in congestion, slowed down traffic, and that traffic attempting to enter the clinic either had to slow further or stop until persons in the driveway moved out of the way. J.A. 51. The court further found that

persons designated by defendants as "sidewalk counselors" approached cars while they were forced to hesitate or stop and attempted to get the attention of the occupants to give them literature and to urge them not to go to the clinic. J.A. 52-53. Demonstrators were seen running along side of and in front of patients' cars and pushing pamphlets through car windows to persons who had not indicated any interest in the literature. *Ibid.* Some patients turned away from the crowd in the driveway and did not enter. J.A. 54. Persons would occasionally place a ladder on the outside of the clinic's west and north fences to position themselves above the fence and attempt to shout at staff and patients entering the clinic, including on one occasion shouting to a staff person, "I pray that God strikes you dead now!" J.A. 53.

With regard to the effect of defendants' conduct on patients, the court found that "[a]s a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures." J.A. 54. "[T]he noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms." *Ibid.* Delay in undergoing the medical procedures (which occurred when patients were turned away because of the crowd in the driveway or arrived too anxious to be treated, J.A. 149-153, 154, 590), increased the risk associated with those procedures. J.A. 54.

On other occasions after the entry of the original injunction, a defendant and others acting in concert with him, approached the private homes of clinic staff and directly communicated with persons at those homes, including minor children who were alone. They carried signs, walked up and down the sidewalk or street in front of the residences, shouted at passers-by, rang doorbells of

neighbors, and provided literature identifying the employees as "baby killer[s]." J.A. 53. On one occasion, a defendant and others demonstrated at a motel where a staff physician was staying. Some of the others entered the lobby yelling "child murderer" and "baby killer" and prevented the physician from leaving for the clinic until after the demonstration. J.A. 53-54. On another occasion, the physician was followed by a person associated with the defendants who "communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle." J.A. 54. As a result of the foregoing, and after a physician was killed at a clinic in north Florida, the physician quit his employment at respondent's clinic. J.A. 54-55.

The court found that defendants and persons acting in concert with them had recorded patients' license plate numbers and used them to obtain the patients' home addresses, where they contacted them. The court found that "patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension." J.A. 55.

Based on these and other detailed findings, the court concluded that the actions of defendants and those acting in concert with them in the street and driveway continued to impede and obstruct staff and patients from entering the clinic. The court further concluded that the noise associated with the demonstrations impermissibly interfered with the operation of the clinic and the well-being of the patients. J.A. 55. Finally the court concluded that the actions of defendants and those acting in concert with them directed at the clinic employees' residences, and "the uninvited contacts, shadowing and stalking" of clinic staff and patients by defendants and those acting in concert with them were also impermissible conduct and should be restrained. J.A. 56. At the same time the rights of defendants "to demonstrate, speak and make known their views should be recognized and protected." *Ibid.*

Accordingly, on April 8, 1993, the court issued an amended permanent injunction addressed to defendants "and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order." J.A. 56-57. The injunction prohibits them from entering, congregating, demonstrating or engaging in other specified conduct within 36 feet of the clinic, J.A. 57-58 (the 36-foot clinic buffer zone); from physically approaching persons seeking clinic services within 300 feet of the clinic unless invited to do so, J.A. 59 (the 300-foot clinic buffer zone); from approaching or congregating within 300 feet of the residences of clinic employees, J.A. 59-60 (the 300-foot residential buffer zone); and from engaging in certain other specified conduct such as assaulting or threatening clinic patients or employees.[2]

Petitioners appealed the entry of the amended injunction to an intermediate appellate court in Florida, which certified the case to the Supreme Court of Florida. J.A. 89.

3. The Florida Supreme Court affirmed. Pet. App. A1-A25. The court concluded that the challenged restrictions are content-neutral, and that numerous significant government interests are served by the injunction, including protection of the state and federal constitutional rights of citizens to seek lawful medical and counseling services in connection with pregnancy, ensuring public safety and order, promotion of the free flow of traffic on public streets and sidewalks, protection of property rights of all Florida's citizens, and protection of residential privacy and ensuring medical privacy. *Id.* at A15-A16.

The court also found that the injunction restrictions are narrowly tailored, that ample alternative channels of communication are left open because the defendants can at all times engage in expressive activity in the vicinity of the clinic, and that the doctrine of prior restraint did not

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[2] The complete injunction is set forth at J.A. 50-65, and includes a map of the relevant area.

apply because the injunction was not content-based. Pet. App. A19-A20. The court rejected a vagueness challenge to various aspects of the injunction, reasoning that the language was sufficiently specific to provide reasonable notice and was fashioned to combat specific past abuses. *Id.* at A21-A22. The court rejected an overbreadth challenge noting that the injunction is narrowly tailored and that its language applying to those acting in concert with defendants tracks the language of Fla. R. Civ. P. 1.160(c). The court did not find a danger that the ban would be unfairly enforced against anyone not having notice or knowledge of the injunction. Pet. App. A22. The court noted that its holding "is consistent with the vast weight of both federal and state caselaw, wherein courts have upheld virtually all the present restrictions under similar circumstances." *Id.* at A24.[3]

SUMMARY OF ARGUMENT

The Florida trial court's injunction contains reasonable time, place and manner restrictions that are narrowly tailored to serve significant government interests and that leave ample alternative channels open for petitioners to communicate their message. The buffer zones created by the injunction are not content-based restrictions on free speech and association. The injunction was framed in response to illegal *conduct*, rather than speech, and it does not ban any particular message but only limits the manner in which speech can be conveyed in certain places. Nor do the buffer zones constitute prior restraints. The injunction is designed to preclude continuation of unlawful

[3] The Florida Supreme Court also noted that a panel of the Eleventh Circuit had "recently ruled that the federal district court had erred in denying an abortion opponent's request for relief from the * * * injunction" in this case. See Pet. App. A25. In a dissenting opinion, Judge Paine (Senior District Judge, sitting by designation), pointed out that the majority opinion omitted the factual background of the injunction and disagreed with the majority's analysis of the plaintiff's standing. *Cheffer* v. *McGregor*, 6 F.3d 705, 712-715 (1993).

activity which the trial court found was committed by the named defendants and persons acting in concert with them. It is tailored to ensuring that those persons can still communicate their message, but in a manner consistent with unimpeded access to medical services at the clinic and the health and safety of persons seeking and providing abortion-related services.

The fact that the injunction applies to persons acting in concert with the named defendants does not violate the constitutional guarantee of free association. Enjoining persons acting in concert with the defendants was a reasonable exercise of judicial authority designed to ensure that the purpose of the injunction was not evaded. Nor does the injunction suffer from unconstitutional vagueness or overbreadth.

ARGUMENT

I. THE STATE COURT'S INJUNCTION IS A CONDUCT-BASED, RATHER THAN A CONTENT-BASED, REGULATION

Petitioners' principal challenge to the Florida trial court's injunction is that it is a content-based regulation of expressive activity. That contention is mistaken. The injunction in this case is not based on either the content of speech or viewpoints espoused, but on conduct violating the rights of the clinic, its patients, staff, and the public.

It is important to note that the trial court did not enjoin petitioners or other defendants from using any particular language or communicating any particular message—the injunction does not in any way restrict *what* defendants may say. As the Florida Supreme Court correctly explained:

> The restrictions regulate when, where, and how Operation Rescue[4] may speak, not what it may say.

[4] The Florida Supreme Court referred to petitioners and the other defendants collectively as Operation Rescue.

> The restrictions make no mention whatsoever of abortion or any other political or social issue; they address only the volume, timing, location and violent or harassing nature of Operation Rescue's expressive activity.

Pet. App. A14.

Nor was the injunction in this case issued because of defendants' views or the content of their expressive activity. It was issued because defendants had repeatedly interfered with the rights of others after having once been enjoined from doing so. Thus, after a three-day evidentiary hearing, the trial judge specifically found that the actions of defendants and those acting in concert with them had "impede[d] and obstruct[ed] both staff and patients from entering the clinic," that the noise associated with their demonstrations "interfere[d] with the operation of the clinic and the well-being of its patients," that their targeting of the residences of clinic staff interfered with the right of privacy of those staff members, and that they had engaged in "shadowing and stalking" of clinic patients and staff. J.A. 55-56.

The portions of the injunction challenged by petitioners are based directly on these factual findings of unlawful conduct.[5] The 36-foot buffer zone in which all congregating is prohibited is supported by the demonstrated need to offer protection against physical obstruction of access to the clinic; the 300-foot buffer zone in which uninvited contacts with clinic patients are prohibited is supported by the trial court's conclusion that such contacts, including "shadowing and stalking," were intimidating to patients; the prohibition on noisy demonstrations during the hours of surgical procedures and recovery periods is supported by the need to protect the medical welfare of patients; and the 300-foot buffer zone around the residences of clinic

[5] The conduct specified by the trial court is unlawful under Florida law. See Pet. Br. 17 & n.7.

staff is supported by the trial court's conclusion that rights of privacy had been repeatedly violated. Each of these provisions, it is clear, is justified by petitioners' prior illegal conduct, "without reference to the content of the regulated speech." *Boos* v. *Barry*, 485 U.S. 312, 320 (1988); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).[6]

Neither the fact that the injunction in this case was issued in response to anti-abortion protests nor the fact that it applies only to persons acting in concert with defendants transforms the injunction into a content-based prohibition. In *Frisby* v. *Schultz*, 487 U.S. 474 (1988), for example, the Court treated a city ordinance banning residential picketing as content-neutral despite recognition of the fact that the ordinance was enacted in response to anti-abortion picketing. *Id.* at 476-477. And application of the injunction in this case to persons acting in concert with the named defendants responds, not to an association of viewpoints or opinion, but to the factual finding that the defendants and persons acting in concert with them had unlawfully interfered with the clinic's business relations, with the right of the clinics' employees to work, and with the right of choice of the clinics' patients.[7]

[6] To the extent that various instances of conduct against clinic patients and employees constituted physical assaults, such conduct "is not by any stretch of the imagination expressive conduct protected by the First Amendment." *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993). Similarly, "violence and other types of potentially expressive activities that produce special harms distinct from their communicative impact," such as threats, "are entitled to no constitutional protection." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984); see *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538 (1992); *Watts* v. *United States*, 394 U.S. 705, 707 (1969).

[7] Petitioners claim that the injunction is content-based because of the trial judge's statements to certain protestors who were arrested shortly after its issuance. See Pet. Br. 10-13, 26-27. The judge's remarks, however, merely confirm what is evident from the face of the injunction: whether a person violates the injunction depends on whether that person is a named defendant or someone acting in concert

The injunction does not in any way prohibit expressions of views that agree with or support petitioners; persons holding such views are free to express them at any time or in any place so long as they do not act in concert with defendants in interfering with the clinic, its patients or its staff. Nor have petitioners shown, or even suggested, that the state of Florida would not afford similar injunctive relief to any other business that found its entrance repeatedly blocked by demonstrators, or that similar injunctive relief could not be obtained in other situations where demonstrations interfere with the exercise of constitutional rights.[8]

II. THE BUFFER ZONES ARE REASONABLE TIME PLACE AND MANNER RESTRICTIONS THAT SERVE SIGNIFICANT GOVERNMENT INTERESTS, THAT ARE NARROWLY TAILORED TO THOSE INTERESTS, AND THAT LEAVE OPEN AMPLE ALTERNATIVE CHANNELS FOR COMMUNICATION

This Court has long recognized that "the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos* v. *Barry*, 485 U.S. 312, 318 (1988) (opinion of O'Connor, J.), quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). The right of free speech, however, is not unlimited:

> [T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. * * * [Activities] protected by the First Amendment, are subject to *reasonable time, place, and manner restrictions.*

Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (emphasis added). "Even protected speech is not equally permissible in all places and at all times." *Cornelius* v. *NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 799 (1985). Where a case, like this one, involves a traditional public forum such as sidewalks and streets, the state may therefore "enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); see also *Poulos* v. *New Hampshire*, 345 U.S. 395, 405 (1953) (indicating approval "of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press, and the exercise of religion"). These principles apply as well where courts seek to use their equitable powers to preserve public order or private rights. See *Hirsh* v. *City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (referencing "injunctive relief imposing time, place, and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct").

Indeed, in some respects, the powers of a court imposing injunctive relief in specific cases upon findings that unlawful conduct has occurred and is likely to be repeated unless enjoined, may be broader than legislative powers that are not based on such findings. See *United States* v. *Paradise*, 480 U.S. 149 (1987) (upholding remedial injunction that employed a racial classification which would not be lawful in a legislative enactment); *Hirsh*, *supra* (distinguishing time, place and manner injunction against proven wrongdoers from "naked prior restraint" injunction against

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with a named defendant, not on the content of that person's speech. See J.A. 66-77.

[8] In addition to their challenge to the buffer zones, petitioners contend that the prohibition against their displaying images observable to patients in the clinic during surgical procedures and recovery periods is content-based, Pet. Br. 5, 11-12. That prohibition, however, like all of the other aspects of the injunction, does not depend in any manner on the content of the images.

marchers without history of illegal conduct). When defendants have violated the law, injunctive relief may "go[] beyond a simple proscription against the precise conduct previously pursued," even if the resulting order "may curtail the exercise of [First Amendment] liberties that the [defendant] may otherwise enjoy." *National Soc'y of Prof. Eng'rs* v. *United States*, 435 U.S. 679, 697, 698 (1978); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 309 n.22. (1986) ("the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large"); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941).[9]

In the instant case the trial court carefully crafted an injunction designed to address specific actions by the defendants and persons acting in concert with them that it had found to be unlawful. These actions included unlawful interference with respondents' business relations, unlawful interference with the clinic patients' right of access to medical services, interference with clinic employees' state constitutional right to work, interference with rights of privacy, and stalking and threatening of clinic patients and employees. The court further found that these repeated illegalities were such that respondents and others would suffer irreparable harm if defendants were not enjoined. State criminal remedies were specifically determined not to provide adequate relief to respondents in these circumstances. It is also notable that the restrictions challenged

[9] Petitioners' reliance on *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (see Pet. Br. 20) is misplaced. The validity of the injunction was not before the Court in that case. That injunction was, moreover, extremely broad and in effect prohibited all picketing and boycott activity. The Court expressly stated that it was not presented with, and did not need to decide, "the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity." 458 U.S. at 915, n.49.

by petitioners were imposed only after the state court had first attempted to remedy the situation by less restrictive relief; defendants' own actions in violating that injunction necessitated further restrictions by the court. The Florida Supreme Court explained:

> While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Pet. App. A24.

In our view, the Florida Supreme Court correctly determined that the content-neutral injunction in this case satisfies the constitutional requirement that it be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45.

A. Significant Government Interests Are at Stake

The Florida Supreme Court clearly identified the important governmental interests directly served by the injunction in this case. Most significantly, the state undoubtedly has a substantial interest in protecting the exercise of state and federal constitutional rights, including a woman's right to seek medical services in connection with pregnancy, a right protected by both the federal and Florida constitutions. *Roe* v. *Wade*, 410 U.S. 113 (1973); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); cf. *Burson* v. *Freeman*, 112 S. Ct. 1846 (1992) (state can prevent campaigning within 100 feet of a polling place, to protect constitutional right to vote). As a result of actions by the named defendants and those acting in concert with them, those constitutional rights were impeded in this case; some persons had to delay their visits to the clinic and

others had to be administered higher than normal levels of sedation prior to surgical procedures, thus creating unwarranted health risks. J.A. 151, 153, 154, 590. As is often the situation with medical treatment, the delay itself also exposed the patients to greater health risks. J.A. 155-156.

This case also involves the related "state interest in ensuring medical privacy." Pet. App. A16. The Florida Supreme Court explained that "Florida citizens are entitled to both unimpeded access to licensed medical facilities and freedom from unwanted confrontations and communications when undergoing lawful medical treatment, particularly where the effect of such confrontations is to place the patient's health and safety in jeopardy." *Ibid.* Protecting health care facilities from disruption is itself a legitimate state objective. See *NLRB* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979) (upholding prohibition on labor soliciting in areas of hospital associated with patient care); *Roe* v. *Wade*, 410 U.S. 113, 150 (1973) (state has interest in seeing that abortion is performed "under circumstances that insure maximum safety for the patient"); *Medlin* v. *Palmer*, 874 F.2d 1085 (5th Cir. 1989) (upholding local ordinance forbidding operation of loudspeaker or sound amplifier within 150 feet of, inter alia, any hospital, nursing home, or facility that provides surgical services on an outpatient basis). The state interest in protecting residential privacy is significant as well. *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988).

Florida's interest in public safety and order, especially in the free flow of traffic and protection of property rights, is also substantial here. See *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941) ("The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."); *Schneider* v. *State*,

308 U.S. 147, 160 (1939) (municipal authorities have the duty to keep streets open and available for the movement of persons and property, the primary purpose to which streets are dedicated); *Heffron*, 452 U.S. at 650 (state interest in protecting the safety and convenience of those using a public forum is a valid governmental objective). The right of free and unimpeded access to places of businesses and to residences was also endangered in this case. See *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.").

B. The Injunction is Narrowly Tailored To Serve the Significant Government Interests

A time, place and manner restriction is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the" restriction. *Ward*, 491 U.S. at 799. In the case at bar, the trial court learned through extensive testimony that its less restrictive initial injunction did not adequately serve the significant government interests at stake. Each of the additional restrictions imposed was required in order to deal with violations of public and private rights that continued despite that prior injunction. The Florida Supreme Court thus aptly noted that "[t]he trial court found as a factual matter that each of these restrictions is necessary to counteract specific abuses * * * after entry of the permanent injunction nearly six months earlier. * * * [C]ompetent, substantial evidence supports all the trial court's factual findings." Pet. App. A17.

The determination as to whether a time, place and manner restriction is narrowly tailored must be made in light of the character of the particular location involved:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time,

> place, and manner that are reasonable." . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. *City of Rockford*, 408 U.S. 104, 116 (1972). The trial court here crafted remedies for unlawful activity incompatible with two locations—the clinic and the residences of clinic employees. In doing so, it tailored remedies that preserved the ability of the defendants to communicate their anti-abortion message, while restraining them from violating the rights of those who disagree with that message.

The trial court thus tailored the 36-foot buffer zone at the clinic in order to permit unimpeded access to the clinic by patients and staff. This zone simply requires that the defendants move to one side of the street and away from the driveway to the clinic, where they repeatedly had interfered with free access of patients and staff. See *Cameron* v. *Johnson*, 390 U.S. 611 (1968) (upholding statute that prohibited picketing that obstructed or unreasonably interfered with ingress or egress to or from public buildings, including courthouses, and with traffic on the adjacent streets sidewalks). Despite this access zone, the defendants still have full ability to express their message to all those who enter or pass in front of the clinic by displaying signs or by speaking from the area directly across the street from the only entrance to the clinic.[10]

The 300-foot buffer zone within which defendants are prohibited from uninvited physical approaches to patients was designed to counter the especially pernicious and unlawful stalking, shadowing, and other uninvited contacts by the defendants and those acting in concert with them

[10] In addition, the court specifically limited the width of the zone to only five feet on one side of the clinic to permit defendants access to the shoulder area of the highway. J.A. 57. The court also provided for a crosswalk to facilitate entrance to that area. J.A. 58.

repeatedly imposed on patients seeking to enter the clinic. See *International Society for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701, 2708 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid solicitation"); cf. *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding state restriction of literature distribution at fair to booths, thus requiring listener-initiated contact). Once again, the imposition of this restriction does not prevent defendants from displaying their message within this zone through signs, through passively distributing leaflets within the zone to those who wish them, or from speaking within the zone. The limitation on loud noise and intrusive signs during surgical procedures and recovery periods is tailored to the state's undoubted interest in ensuring the health and safety of persons undergoing serious medical treatment; this regulation closely resembles the familiar "quiet" zones that typically surround hospitals treating surgical or seriously ill patients. Cf. *Grayned*, 408 U.S. at 116; *Boos* v. *Barry*, 485 U.S. 312, 332 (1988).

The 300-foot residential buffer zone imposed by the trial court applies to the residences of clinic employees. As in *Frisby* v. *Schultz*, *supra*, the type of activity restricted is targeted picketing, not speech aimed at the general public. The court acted because clinic employees and their families had been subjected to threatening conduct and harassment at their residences, which included apartment complexes (J.A. 493), condominiums (J.A. 550-551), and a motel (J.A. 173-179). The size of the buffer zone imposed by the court apparently was tailored to fit these residences, where the considerations are somewhat different from those affecting the single-family suburban homes involved in *Frisby*. See *also Burson* v. *Freeman*, 112 S. Ct. 1846,

1857 (1992) (upholding validity of 100-foot zone around polling place on election day and specifying that "question whether the 100-foot boundary line could be somewhat tighter" is not of "constitutional dimension" because difference between 100-foot zone and 25-foot zone is "a difference only in degree, not a less restrictive alternative in kind"); *Boos* v. *Barry*, 485 U.S. at 330-331 (upholding validity of 500-foot zone around embassy in which there is a ban on any assemblage of three of more people that poses a threat to the peace of the embassy).

C. The Injunction Leaves Open Ample Alternative Channels For Communication.

Despite the entry of the injunction, ample alternative channels remain available through which petitioners may communicate their anti-abortion message. Most important, the injunction does not bar defendants from communicating this message to the audience they most wish to reach: persons entering and leaving the Aware Woman Clinic. As noted above, the injunction permits the defendants to picket, demonstrate and communicate in a place adjacent to the clinic where all persons entering and leaving the clinic's parking lot are able to see them. They must remain only 36 feet (12 yards) from the clinic property. From their location across the street from the clinic, defendants are no more than 10 or 12 feet from cars entering or leaving the clinic. J.A. 486. As the Florida Supreme Court noted,

> Dixie Way [the road in front of the clinic] is only twenty-one feet wide in the area of the Clinic and for all practical purposes Operation Rescue will be able to convey its message just as effectively from the south side of the road as the north. * * * The only thing Operation Rescue will be unable to do from the south side that it could otherwise do from the north is block ingress to and egress from the Clinic.

Pet. App. A19.

Furthermore, the defendants remain completely free to communicate their message throughout the community by oral speech, publications, and the use of all other media, so long as they remain outside the very small geographic area specified in the injunction. Other means that have been used by defendants and those acting in concert with them include contacting patients by telephone and contacting patients and clinic employees by mail. J.A. 185-187, 567, 572-574. The record also reveals that there is a parking lot across the street from the clinic where literature can freely be distributed by defendants. J.A. 260, 470-471. In addition, defendants and those acting in concert with them publicize their views through counseling clinics elsewhere in the community. J.A. 471. Cf. *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 849-850 (1992) (labor organizers had reasonable means available for informing employees of union's message without entering employer's parking lot because employees were not beyond the reach of the organizers through other means including mail, phone calls, signs near entrance and advertising).

III. THE BUFFER ZONES ARE NOT UNCONSTITUTIONAL PRIOR RESTRAINTS

Neither of the factors that have historically led the Court to insist on extremely close judicial scrutiny for "prior restraints" applies in the circumstances of this case. The limited time, place and manner restrictions imposed by the injunction here do not remotely constitute a total ban on particular speech, but permit defendants' speech-related activities at all other locations within the community. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 705-706 n.2 (1986); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). Nor is there either prepublication censorship, *e.g.*, *New York Times, Co.* v. *United States*, 403 U.S. 713 (1971), or a licensing or regulatory system that leaves a would-be speaker's ability to use a public forum to the unfettered discretion of administrative officials. *E.g.*, *Southeastern Promotions, Ltd.* v. *Conrad*,

420 U.S. 546, 555 (1975). Indeed, in *Southeastern Promotions, Ltd.*, the Court recognized that "regulation of time, place or manner related to the nature of [a specific] facility" does not trigger application of the special scrutiny reserved for broad prior restraints. *Id.* at 555; see also *Hirsh* v. *City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (distinguishing injunction that imposes time, place, and manner restriction from injunction that constitutes a naked prior restraint).

The instant case also involves several of the other factors specifically identified in *Southeastern Promotions, Ltd.* as negating the presence of an unconstitutional prior restraint. See 420 U.S. at 555-556. Thus, the buffer zones imposed by the injunction relate directly to the nature and intended use of the clinic and private residences where they apply. Defendants' conduct was also not pure speech, and affected immediately and detrimentally the rights of other individuals. Defendants' expressive activities were, moreover, aimed at captive audiences both at the clinic[11] and at private residences of staff members. In the presence of similar factors, at least a dozen state and federal appellate courts have applied time, place and manner analysis to limited, site-specific injunctions against

[11] The captive audience problem at the clinic is particularly significant. The clinic has taken measures to exclude noise and other outside disturbances by erecting stockade fences around the clinic and a wall in front of it. The clinic also attempted to counter the impact of yelling and shouting by defendants by playing soft music from speakers at the clinic. See J.A. 273, 282-283, 284, 355-356, 542. Thus, although respondents did what they could to avert their eyes and ears from unwanted speech, they were thwarted in such efforts by harassment of persons entering and leaving the clinic and by persons placing ladders against the walls to display signs and shout at staff and patients; the clinic's speakers were also stolen. See J.A. 273, 284, 355-356, 459-462, 538-539, 542, 551, 553, 556.

blockading and harassment, and have not characterized such injunctions as impermissible prior restraints.[12]

In seeking to label the injunction here as a prior restraint, petitioners mischaracterize its terms and effect: The 36-foot clinic buffer zone, for example, does not "create[] a flat ban on all pro-life speech" within the zone as petitioners contend (Pet. Br. 38, 39). Because of defendants' prior conduct in using that zone to interfere with access to the clinic, the injunction excludes defendants and those acting in concert with them from that small critical area. Petitioners, however, still can transmit their speech into that zone verbally and through display of signs. In addition, persons sharing their views, but who are not acting in concert with them (and who therefore do not create the danger of impeding access to the clinic), can enter the zone and express anti-abortion speech.

The 300-foot clinic buffer zone similarly does not "require[] consent to speak or distribute literature" as

[12] See *Northeast Women's Center, Inc.* v. *McMonagle*, 939 F.2d 57, 62-63 (3d Cir. 1991); *New York State Nat'l Org. for Women* v. *Terry*, 886 F.2d 1339, 1363-1364 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Portland Feminist Women's Health Center* v. *Advocates for Life, Inc.*, 859 F.2d 681, 686 (9th Cir. 1988); *Planned Parenthood Shasta-Diablo, Inc.* v. *Williams*, 16 Cal. Rptr. 2d 540, 544 (Ct. App.), review granted, 19 Cal. Rptr. 2d 492 (Cal. 1993); *Hirsh* v. *City of Atlanta*, 401 S.E.2d 530, 533 (Ga.), cert. denied, 111 S. Ct. 2836 (1991); *Planned Parenthood League* v. *Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); *Horizon Health Center* v. *Felicissimo*, 622 A.2d 891, 897-899 (N.J. Sup. Ct. App. Div.), cert. granted, 634 A.2d 527 (1993); *Kaplan* v. *Prolife Action League*, 431 S.E.2d 828, 842-844 (N.C.), review denied, 436 S.E.2d 379 (1993), petition for cert. pending, No. 93-1159; *Fargo Women's Health Org., Inc.* v. *Lambs of Christ*, 488 N.W.2d 401, 407 (N.D. 1992); *Dayton Women's Health Center* v. *Enix*, 589 N.E.2d 121, 126-127 (Ohio Ct. App. 1991), cert. denied, 112 S. Ct. 3033 (1992); *Klebanoff* v. *McMonagle*, 552 A.2d 677, 678-682 (Super. Ct. 1988), appeal denied, 563 A.2d 888 (Pa. 1989); *Valenzuela* v. *Aquino*, 800 S.W.2d 301, 304 (Ct. App. 1990), aff'd in part & rev'd in part on other grounds, 853 S.W.2d 512 (Tex. 1993); *Bering* v. *Share*, 721 P.2d 918, 925 (Wash. 1986), petition for cert. dismissed for want of jurisdiction, 479 U.S. 1050 (1987).

petitioners contend (Pet. Br. 38, 40). Petitioners are completely free to direct speech towards anyone in the zone, so long as they do not "physically approach" persons seeking clinic services unless the person consents. Nor does the fact that petitioners must permit a person to leave or walk away if the person does not want to receive a certain message "empower[] private citizens with injunctive authority to permanently restrain speech." *Id.* at 40. The injunction simply guarantees to clinic patients the right that this Court has repeatedly recognized of an unwilling audience to avert its eyes and ears from unwanted speech. See *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988). And even when a patient walks away, petitioners are not prevented from communicating so that the person can hear them, but only from physical approaches and harassment. See *Kovacs* v. *Cooper*, 336 U.S. 77, 86 (1949) (noting that when Court previously had upheld right to door-to-door soliciting it was because homeowner could "protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' The Court never intimated that the visitor could insert a foot in the door and insist on a hearing").[13]

Petitioners here also can distribute literature within the 300-foot zone, although they cannot physically approach persons seeking clinic services in order to do so. Petitioners are completely free to distribute literature from a booth or other location that does not involve any

[13] The part of the injunction that provides for "invited contact" (see J.A. 63), also is not a prior restraint or a "discretionary license to suppress speech" (Pet. Br. 41-42). It does not ban any speech by petitioners. All it does is restrict the manner in which they can communicate their message to clinic employees and patients. It preserves the employees' and patients' right not to be forced into receiving unwanted communication from a person in direct physical contact with them. This restriction on the manner of communicating is more than justified by the record in the case. cf. *Frisby*, *supra*; *Schneider* v. *State*, 308 U.S. 147, 162 (1939) (right to distribute literature only "to one willing to receive it").

physical approach. Cf. *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640 (1981)(limiting distribution to booth at fair grounds upheld as reasonable time, place and manner restriction). Enjoining petitioners from forcing leaflets upon persons who do not want them is not an unconstitutional prior restraint, but rather a protection of rights of members of a captive audience to attempt to avoid unwanted speech. See *Schneider* v. *State*, 308 U.S. at 160 ("a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet").

The 300-foot residence buffer zone applies only to the residences of clinic employees; it does not constitute a "total ban on residential picketing" (Pet. Br. 40). The object of this restriction, based on evidence of prior abuses, is picketing directed at specific residences, not speech aimed at the general public. As in *Frisby*, "[t]he type of picketers banned by the [injunction] generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident and to do so in an especially offensive way." *Id.* at 486. Finally, the ban on "sounds or images observable to or within earshot of the patients inside the Clinic" is also not a total ban on such speech, as petitioners repeatedly assert (Pet. Br. 38, 39 n.27; 40), but is carefully limited to the time of surgical procedures and recovery periods—7:30 a.m. through noon, Mondays through Saturdays. J.A. 59. Cf. *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949)(upholding ordinance that prohibited sound trucks which emit "loud and raucous" noises from public streets, because in home or on street unwilling listener "is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality").

IV. THE STATE COURT'S INJUNCTION DOES NOT VIOLATE FIRST AMENDMENT RIGHTS OF FREEDOM OF ASSOCIATION AND IS NOT UNCONSTITUTIONALLY OVERBROAD OR VAGUE

Both Florida Rule of Civil Procedure 1.610(c) and Federal Rule of Civil Procedure 65 provide that injunctive relief may be binding upon "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Fed. R. Civ. P. 65(d). The injunction in this case is framed pursuant to the terms of that rule.

Petitioners contend that the "in concert with" provision of the injunction renders it unconstitutional on various grounds. Pet. Br. 24-30 (overbreadth), 7, 32 (vagueness); 45-49 (freedom of association). As a threshold matter, there is no need for the Court to consider the injunction's application to persons other than the petitioners. In *Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9 (1945), a party subject to an order entered by the National Labor Relations Board argued that the order was invalid because of a provision that it applied to "successors and assigns" of the enjoined party. This Court, noting that the party before it was not a successor or assign, characterized the matter as "an abstract controversy over the use of these words," and declined to decide under what circumstances a successor or assign could be liable for violation of the order. *Id.* at 15. Here, similarly, the petitioners are all named defendants; no issue is presented regarding the injunction's application to other persons.[14]

[14] To the extent petitioners claim that they are not affiliated with the other named defendants (Pet. Br. 7, 44-46), that factual determination is not before the Court because it is not included in the questions presented. Petitioners' claim is, moreover, directly contradicted by the record. Petitioners each stipulated that they are active in and members of an organization known as "Operation Rescue America," another named defendant. Stipulation, Jul. 30, 1992, at 1. Included as an exhibit to respondents' verified petition for injunction is a flyer announcing that "Rescue America presents Operation Rescue: In Central Florida" at a rally on October 25, 1991, and provides the names of all three petitioners along with their telephone numbers as persons to contact for more information. R. 8; see also J.A. 108, 110-111, 414-416. The court found that Rescue America literature directs that "their members should ignore the law of the State and the police officers who remove them from their blockading positions." J.A. 7. The trial court found that the petitioners were members of Operation Rescue and Operation Rescue America. J.A. 6.

The Florida Supreme Court did not disturb these factual findings, and petitioners offer no justification for this Court to disturb them.

In all events, the restraint on those acting in concert with defendants does not render the injunction unconstitutional. Rule 65(d) derives from "the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co.*, 324 U.S. at 14. That doctrine is necessary to prevent an enjoined defendant from evading the restraints imposed by an injunction by simply finding someone else to do his or her bidding. *Ibid.* This consideration is particularly important in a case such as this one, where the defendants include organizations and might otherwise evade the injunction by replacing any specifically enjoined protestors with other persons. See *Cheffer* v. *McGregor*, 6 F.3d at 713-714, 715 n.6 (Paine, J., dissenting). Moreover, it was valid for the injunction to restrain *only* the named defendants and those acting in concert with them. As other courts have noted in similar cases, it is only such persons who have been shown to be engaging in the behavior that has given rise to the need for injunctive relief. *E.g.*, *McMonagle*, 939 F.2d at 62-63; *Felicissimo*, 622 A.2d at 898.

Nor does the "in concert with" provision violate petitioners' freedom of association or unlawfully restrict group advocacy. Petitioners are not enjoined from

associating with others or from joining with them in holding or expressing a particular viewpoint. There is no constitutional right to act in concert with others so as to deprive third parties of legally protected rights.

Petitioners' claim that the term "in concert with" should be declared unconstitutionally vague is also without merit. This Court on several occasions has indicated the appropriateness of using that term in valid injunctions. See, *e.g.*, *Allee* v. *Medrano*, 416 U.S. 802, 809 (1974)(noting that state court injunction was "quite limited [because it] proscribes picketing by the appellees [the union and certain individuals] and those acting in concert with them only on or near property owned by [employer]"); cf. *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 177-180 (1973) (holding that under Fed. R. Civ. P. 65(d) even a bona fide purchaser can be considered in privity with its pre-decessor where the purchaser knew of an unremedied wrong).

Petitioners' other vagueness challenges (Pet. Br. 30-37) and related overbreadth challenges (*id.* at 28-29) should be rejected as well. The injunction does not "forbi[d] or requir[e] the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The Florida Supreme Court correctly found that, in the specific factual context here, the injunction does not require persons of average intelligence to "guess at its meaning and differ as to its application." Pet. App. A21. Nor do words such as "agents," "prompt," and "approaching," inject unconstitutional vagueness. By using terms "marked by flexibility and reasonable breadth, rather than meticulous specificity," the trial court's injunction properly "delineate[d] its reach in words of common understanding." *Grayned*, 408 U.S. at 110, 112; *Boos* v. *Barry*, 485 U.S. at 332.

Petitioners specifically challenge, as unconstitutionally vague and overbroad, the phrase "sounds or images observable to or within earshot of the patients inside the clinic." The use of this phrase must be assessed in light of the record of the case. That record shows that the only images observable to persons "inside the clinic" are those hoisted above the clinic fences by demonstrators who climb on ladders to harass patients within the clinic grounds. See J.A. 284, 355-356, 459-462, 542. Persons of average intelligence can likewise reasonably determine how far the noise they are making travels. See, *e.g.*, *Grayned*, 408 U.S. at 107-08 (upholding against vagueness challenge, statute that forbade "the making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class thereof" by a person on grounds adjacent to school building); *Kovacs* v. *Cooper*, 336 U.S. 77, 79 (1949)(upholding against vagueness challenge the use of the terms "loud and raucous" to describe prohibited noises because the words "through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden"). The Florida Supreme Court pointed out that each of the injunction's restrictions was aimed at a specific past abuse so that the defendants were on notice of the conduct being prohibited. Pet. App. A21.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted.

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